NO. 48527-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHERYL NICKERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable William C. Houser, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to file a motion to dismiss the witness tampering charge under CrR 8.3(c).

2. Defense counsel was ineffective for failing to object to the introduction of evidence demonstrating appellant had a history of criminal conduct.

3. The trial court commented on the evidence and denied appellant a fair trial.

4. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant was charged with purchasing methamphetamine on two occasions from a confidential informant. Prior to trial, appellant used a Facebook post to reveal the identify of that confidential informant. The State responded by adding a charge of Tampering With a Witness. Defense counsel properly recognized the Facebook post did not satisfy the elements of that crime, but failed to move for pretrial dismissal under CrR 8.3(c). Consequently, although the charge was later dismissed at the close of the State's case, jurors were exposed to irrelevant and highly prejudicial evidence concerning the post. Moreover, even after the dismissal, counsel did not ask for a curative instruction concerning the evidence

jurors should not have heard. Did counsel deny appellant her constitutional rights to effective representation and a fair trial?

2. The trial judge granted a defense motion in limine precluding the State from introducing evidence of appellant's criminal past, including her prior drug use. Despite this ruling, defense counsel made no efforts during trial to prevent the introduction of substantial evidence on this very topic. Did this also deny appellant her right to effective representation and a fair trial?

3. A key defense trial strategy was to demonstrate that the confidential informant had intentionally violated the terms of her informant agreement, the successful completion of which was to result in dismissal of a pending criminal charge against her. The defense argued this violation revealed the informant to be dishonest and unworthy of jurors' trust. At the end of the informant's testimony, however, the trial judge informed her that she was now "free" from the terms of her agreement, suggesting the court's opinion that she had successfully complied with all terms. Did this improper comment on the evidence deny appellant a fair trial?

4. Assuming none of these errors, alone, warrants a new trial, does their combined impact warrant this result?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Kitsap County Prosecutor's Office charged Cheryl Nickerson with (count 1) Delivery of Methamphetamine on March 5, 2014; (count 2) Deliver of Methamphetamine on March 12, 2014; and (count 3) Intimidating a Witness. CP 1-4. Count 1 included a special allegation that the delivery occurred within 1,000 feet of a school bus stop. CP 2.

The morning of trial, prosecutors amended the charge in count 3 to Tampering With a Witness. CP 11; 3RP[1] 3. Defense counsel objected to the amendment on two grounds: that the charge violated Nickerson's First Amendment rights and there was no probable cause to support it. However, there was no formal motion to dismiss the charge under CrR 8.3(c). 3RP 4-6. The objections were overruled. 3RP 6. At the close of the State's case, however, the charge in count 3 was properly dismissed for lack of evidence. 4RP 258.

A jury convicted Nickerson on counts 1 and 2. 5RP 322-323.

---

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – 11/16/15; 2RP – 11/30/15; 3RP – 11/30/15 and 12/1/15; 4RP – 12/2/15 (mistakenly marked 12/2/16 on cover); 5RP – 12/3/15; 6RP 12/11/15.

The Honorable William C. Houser imposed a standard range sentence of 99 months, which includes 24 months for the school bus stop enhancement on count 1. 6RP 17-18; CP 103-104. Nickerson timely filed her Notice of Appeal. CP 114.

2. Substantive Facts

In February 2014, Lyndsi Reed was facing a new criminal charge involving possession of methamphetamine. 4RP 117, 150-151, 170. With the goal of avoiding that charge, she agreed to act as a confidential informant for the Bremerton Police Department. 4RP 75, 117-122, 170-171, 174. On February 4, 2014, Reed entered into an "informant agreement" requiring her to "build 3 felony level cases" against other individuals through undercover drug purchases. Reed also was required not to use drugs or commit additional crimes and to testify in court if requested. Exhibit 15; 4RP 118-119, 122-123. Upon successful completion of her responsibilities, Bremerton Police promised to make a favorable recommendation to prosecutors regarding potential charges for her methamphetamine possession. Exhibit 15; 4RP 126.

One of the individuals Reed targeted was Cheryl Nickerson. 4RP 75. On March 5, 2014, Reed told her handler, Bremerton Police Officer Harold Whatley, that she had arranged to make a

purchase that day from Nickerson at the Port Orchard Big Lots store. 4RP 75, 85, 155.

Before dropping Reed off at Big Lots, Officer Whatley and fellow Bremerton Officer Rodney Rauback drove Reed to a Park & Ride lot, where Whatley searched Reed for drugs. 4RP 78, 129-131, 202. Although strip searches are sometimes employed, there was no strip search on this occasion. 4RP 79-80. In the absence of a female officer, the search was necessarily limited, and the officers had no way of knowing whether Reed was carrying methamphetamine in her underwear or other personal spaces. 4RP 78-80, 131-134, 219-220. They did not find anything where they checked, however. 4RP 202-203. Officers then provided Reed with $300.00 for the drug purchase after recording the serial numbers on the bills so that the bills could be identified after the buy. 4RP 77-78, 80-84, 202.

Officer Whatley drove Reed to Big Lots, dropped her off, and waited in the parking lot in an unmarked car. 4RP 86-87. Reed met Nickerson in front of the store and the two went inside. 4RP 87. Officer Rauback, who had arrived in his own unmarked vehicle, entered the store and followed the other two until they entered the women's restroom. 4RP 203-206. Officers could not see or hear

what happened in the restroom. 4RP 135, 206, 222. Reed was not wearing a wire or hidden camera. 4RP 91-92.

After a few minutes, Reed and Nickerson exited the restroom and then the Big Lots store.[2] 4RP 87-88, 206. Nickerson was not stopped, so no attempt was made to determine whether she possessed any of the buy money. 4RP 137. Reed headed directly for Officer Whatley's car. 4RP 88, 206-207. Back at the Park & Ride, she handed Whatley a bag of methamphetamine she claimed to have purchased from Nickerson. 4RP 88-90. Officer Whatley again searched Reed and did not locate the buy money or any additional drugs. 4RP 88, 207.

Officers decided to have Reed make a second purchase from Nickerson a week later, on March 12, 2014. 4RP 94-96, 208. Nickerson did not have a permanent place to live and was staying at a home near Bremerton. 4RP 95-96. Reed contacted Nickerson by phone and arranged to meet her at the home. 4RP 98-99. As before, Officers Whatley and Rauback took Reed to a public location and Whatley searched her to the extent a male officer could conduct such a search. 4RP 98, 140-141, 209, 224. And, as before, they

---

[2] The store was within 1000 feet of several school bus stops. 3RP 38-47; 4RP 241-246.

could not discount the possibility Reed was hiding methamphetamine in her underwear or other personal spaces. 4RP 141. Officers then gave Reed $200.00 in recorded buy money. 4RP 95, 98, 209.

Officer Whatley dropped Reed off near the residence and, after seeing Reed and Nickerson walking up the driveway together, parked just down the road. 4RP 97-100. Meanwhile, Officer Rauback drove to an elevated location from which he could see the residence. 4RP 209-210. Rauback had an obstructed view from a distance of about 100 feet. 4RP 210-211. Once Reed and Nickerson walked underneath a carport, Rauback could only see their feet. 4RP 211. He did not see an exchange between the two. 4RP 225. After a brief period, Reed then walked back down the driveway, where Officer Whatley picked her up. 4RP 100, 211-212, 225.

Similar to what occurred the week before, officers made no attempt to contact Nickerson to see if she possessed any of the buy money and none was ever recovered. 4RP 142. Instead, officers drove Reed to another location, where Whatley patted her down and found no buy money or drugs other than a baggie of

methamphetamine she claimed to have purchased from Nickerson.[3] 4RP 100-102, 212. Although Reed had used her own cell phone to communicate with Nickerson for both buys, there is no evidence officers ever examined her phone for messages between the two. 4RP 128-129, 188, 223.

Officers considered Nickerson a small time dealer and, rather than try to find her again after March 12 to arrest her, they simply put out word there was probable cause for her arrest, and she was picked up at a later date. 4RP 145-146.

Reed, who has a 2011 conviction for forgery, took the stand at Nickerson's trial, testifying that she purchased methamphetamine from Nickerson in the Big Lots bathroom on March 5, 2014 and again at the home near Bremerton on March 12, 2014. 4RP 151-163, 176-178, 188-190. On June 10, 2014, Reed was shown a photomontage and selected Nickerson as the individual from whom she had made the purchases three months earlier. 4RP 103-109, 163-165. In total, Reed arranged eight undercover purchases involving three individuals. 4RP 180-181. For her participation, Whatley gave a favorable recommendation to prosecutors, and a

---

[3] Subsequent testing confirmed the substances Reed turned over to officers on March 5 and March 12 contained methamphetamine. 4RP 239.

charge against Reed for possession of methamphetamine was dismissed. 4RP 126-127, 187-188.

Regarding the tampering charge in count 3, Reed testified that a few weeks before trial, she was made aware that Nickerson had posted on Facebook a message identifying Reed as a police informant and warning others of this fact. 4RP 166-167; exhibit 9. Nickerson "tagged" Reed in the post, resulting in Reed's Facebook contacts seeing it. 4RP 213-216. Reed testified that, following the post, she felt intimidated and feared for the safety of her family. 4RP 181-183, 191-192. Officer Rauback also addressed the post, testifying that it constituted a threat, that it implied Reed should not testify at trial, and that Reed interpreted the post in this manner. 4RP 216, 225-230. At the close of the State's case, Judge Houser concluded the evidence concerning the Facebook post was insufficient as a matter of law to support a guilty verdict for tampering. 4RP 256-258. The charge in count 3 was dismissed. 4RP 258.

As discussed more thoroughly below, there were serious mistakes by counsel and the court during Nickerson's trial.

First, on several occasions, it was made clear to jurors that Nickerson had a prior criminal history. Jurors learned that Nickerson

had a history of selling methamphetamine to others, that information about her could be found in an offender database called I/LEADS, that she had been involved in "drug court," and that Officer Whatley recognized Nickerson when he saw her from a "booking photo." 4RP 68-69, 76, 99, 168-175-176. Defense counsel failed to object to any of this evidence.

Second, Judge Houser accidently commented on the evidence. Immediately following Reed's testimony against Nickerson, and referring to her informant agreement with the Bremerton Police Department, Judge Houser declared that Reed was now "free from this agreement you were under," thereby implying her successful fulfillment of all its terms. See 4RP 194.

Nickerson now appeals.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR DISMISSAL OF THE TAMPERING CHARGE AS SOON AS IT WAS FILED.

Shortly before trial was scheduled to begin, and following Nickerson's November 15, 2015 Facebook post identifying Reed as a confidential informant, the Kitsap County Prosecutor's Office added a charge of Intimidating a Witness. CP 3, 7-8. Recognizing they could not prove that charge, on November 30, 2015,

prosecutors amended the charge to Tampering With a Witness. CP 11; 3RP 3-4.

Under RCW 9A.72.120:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation . . . . to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
> (b) Absent himself or herself from such proceedings; or
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation . . . .

RCW 9A.72.120(1). The defense was provided notice of this amendment to the information prior to the beginning of trial on November 30, 2015. 3RP 3.

Counsel for Nickerson properly recognized the Facebook post was insufficient to prove this offense because no jury would find the post to be an inducement to testify falsely, to miss trial, or withhold information from law enforcement. 3RP 4. Counsel argued the charge violated Nickerson's First Amendment rights and failed for lack of probable cause to support it. 3RP 5. Counsel also pointed out that evidence supporting the unsubstantiated charge would be

extremely prejudicial to Nickerson. 3RP 5-6.

Judge Houser overruled the objections to the third amended information, indicated he was not deciding whether there was probable cause to support the charge and, instead, would allow the State an opportunity to present sufficient evidence of the crime. 3RP 6. He noted that, even if the court found an absence of probable cause, the charge could still be presented to jurors. 3RP 6. He was correct on this point. See State v. Jefferson, 79 Wn.2d 345, 347, 485 P.2d 77 (1971) (even where judicial officer finds the absence of probable cause to support charge, prosecutor not bound by finding and can proceed if satisfied probable cause exists).

Unfortunately, defense counsel failed to recognize the obvious and available procedure for nonetheless obtaining a pretrial dismissal of the tampering charge in count 3. Under CrR 8.3(c), "[t]he defendant may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged." The motion must be in writing, supported by an affidavit or declaration alleging no material disputed facts, and may include relevant attachments such as police reports or witness statements. CrR 8.3(c)(1). The State may then respond. CrR 8.3(c)(2). The trial court shall grant the motion if there are no

material disputed facts and, examining those facts in the light most favorable to the prosecution, the facts fail to establish a prima facie case of guilt. CrR 8.3(c)(3).[4]

Defense counsel's failure to file a motion to dismiss count 3 under CrR 8.3(c) was ineffective and denied Nickerson a fair trial.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). Both requirements are met here.

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691); see also In re Pers. Restraint of Davis, 152 Wn.2d 647, 744, 101

---

[4] The procedures found in CrR 8.3(c) are based on the Supreme Court's decision in State v. Knapstad, 107 Wn.2d 346, 353-357, 729 P.2d 48 (1986).

P.3d 1 (2004) ("defense counsel has a duty to investigate all reasonable lines of defense."). Counsel's failure to find and apply legal authority relevant to a client's defense, without any legitimate tactical purpose, is constitutionally deficient performance. In re Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015).

Counsel for Nickerson properly recognized the absence of even probable cause to support the charge in count 3 and properly recognized the serious prejudice to Nickerson that would result from admission of evidence on the tampering charge. Because counsel attempted to keep the charge and evidence from jurors, there clearly was no tactic behind her failure to move for dismissal under CrR 8.3(c). Instead, counsel's failure is simply the result of insufficient research and knowledge about an available option.

This Court addressed similar circumstances in State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011). Harris was charged with first degree assault of a child for shaking a two-month old baby. Harris, 164 Wn. App. at 379-381. Before trial, the State added a second count of assault, alleging a pattern or practice of abuse from the time the baby was born until the shaking incident, a theory not supported by the evidence. Harris, 164 Wn. App. at 381-382. Although defense counsel moved to dismiss this second count

based on a constitutional vagueness challenge and made oral motions to dismiss for lack of factual support, these motions were denied. Id. At the close of the State's case, defense counsel moved again to dismiss the additional charge and the motion was granted based on insufficient evidence. Id. at 382. Defense counsel then moved unsuccessfully for a mistrial, arguing that evidence jurors heard related to count 2 irreparably prejudiced Harris on count 1. Id. The trial court indicated it would give a curative instruction upon request, but defense counsel never requested one. Id.

On appeal, this Court reversed Harris's assault conviction in count 1 based on instructional error. Id. at 383-388. Because his conviction was reversed on this ground, the Court found it unnecessary to decide whether defense counsel had been ineffective for failing to file a formal motion to dismiss count 2, prior to trial, under CrR 8.3(c) and Knapstad. Id. at 379, 388. Nonetheless, this Court indicated, "we cannot perceive any legitimate strategy in counsel's failure to file a *Knapstad* motion before trial." Id. at 388 n.6. This Court continued:

> The record is clear that Harris's counsel was convinced that the State had no evidence sufficient to prove that Harris had engaged in a pattern or practice of abuse of TH. In fact, after the trial court denied defense counsel's motion for a bill or particulars, noting that

> defense counsel's motion resembled a *Knapstad* motion, defense counsel stated an intention to file a *Knapstad* motion. But defense counsel ultimately failed to file a *Knapstad* motion, which prejudiced Harris by allowing the jury to hear evidence of TH's prior abuse in the context of the State's attempt to prove that it was Harris who engaged in a pattern or practice of abusing TH. This resulting prejudice was later compounded by defense counsel's failure to request an instruction clarifying that the jury could not consider evidence of TH's prior injuries in determining whether Harris committed first degree assault of a child despite the trial court's statement that it "would be disposed" to giving such an instruction if the defense would propose one. RP at 1444.

Id.; see also id. at 389 n.7 ("We agree that, if Harris's counsel had filed a proper Knapstad motion, this claim would likely have been dismissed before the evidence was before the jury . . . .").

Although the above discussion from Harris is dicta, it is nonetheless correct and its sound reasoning strongly suggests the proper outcome in Nickerson's case. As in Harris, Nickerson's counsel recognized the absence of sufficient evidence to support the charge at issue (and the prejudice resulting from evidence related to it), moved to dismiss the charge, but failed to file the required written motion to dismiss under CrR 8.3(c) and Knapstad. This was the consequence of deficient performance rather than any legitimate tactic.

Moreover, like Harris, Nickerson suffered prejudice. To show

prejudice, a defendant need only show a "reasonable probability" that but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). There is a reasonable probability here.

Jurors were provided the Facebook message Nickerson posted about Reed. The post includes a photo of Reed and says:

> This is Lyndsi Reed, she is the confidential informant who sign a contract to do controlled buys to get her sentenced reduced; actually her charge disappeared before her contract was fulfilled. BeWARE! I met her while participating in drug court. She was terminated for lying and causing drama among the clean and sober community. I graduated sanction free in 18 months. My father cam mandaville the retired lieutenant of kitsap county sheriff's department attended my graduation. After being terminated from the program lyndsi caught another drug beef and used her previous deceptive skills to try to get out of losing her kids, and doing any jail time, by setting people up with alleged controlled buys. Needless to say my trial starts tom. After a year out on bail, I'm gonna stop letting kitsap railroad and scare me into a plea bargain, because I'm sacred of my history. I say screw that I did my time for my past mistakes and I'm done being bullied. Wish me luck.

Exhibit 9.

The admission of this post prejudiced Nickerson in multiple ways.

First, the post revealed that Nickerson herself had been in drug court, contained an admission that "I did my time for my past

mistakes," and indicated she refused to be scared into pleading guilty based on her "history," which obviously is a reference to prior criminal history. This otherwise irrelevant evidence should never been presented to jurors under ER 401-403, and 404(b).

Evidence must be relevant to be admissible. ER 402. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if relevant, however, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." ER 403. Unfair prejudice "'is that which is more likely to arouse an emotional response than a rational decision by the jury,'" or an undue tendency to suggest a decision on an improper basis. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)). In addition, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b).

Evidence of the post and evidence revealed in the post –

that Nickerson had a criminal history, which included drug offenses, and had served time for criminal offenses – was irrelevant. It was also unfairly prejudicial and suggested Nickerson was a bad person, with a propensity to commit drug offenses, and therefore more likely to have done so on March 5 and March 12, 2014.

Second, both Reed and Detective Rauback were permitted to testify to the impact of the post on Reed. Reed testified that, once she found out about the post, she contacted detectives because it was "scary." 4RP 166. She explained that, once her name and identity as a snitch was revealed, she became scared not only for herself, but also for her children. 4RP 167. She repeated these claims on cross-examination, expressing concern for her entire family:

> It was very easy – if somebody wanted to come to my home, they would be able to do it. There was people that knew where I lived. There's two specific that knew where I lived and that's – that threatened me. Because that's w[h]ere my children live. That's where they lay their heads down. And it was – for me, it did scare me, because I was scared for my children.

4RP 182. She expressed fear for her family yet again on redirect. 4RP 191-192.

Similarly, Detective Rauback testified extensively about the post and how it upset Reed. 4RP 212-216. On cross-examination,

Rauback confirmed that Reed was "really upset" by the post and repeatedly provided his opinion as to why the post constituted a threat against her. 4RP 225-230. Rauback explained that those facing criminal charges will sometimes use social media "in hopes that other people will cast a shadow upon those witnesses or cause, you know, cause concern toward those witnesses for people that they're associated with." 4RP 229. And Rauback confirmed that Nickerson's post had caused Reed to feel threatened. 4RP 229-230.

During closing argument, even though the Tampering charge had just been dismissed, the State reminded jurors of the Facebook post and the testimony concerning it as further proof that Nickerson was guilty of the deliveries. 5RP 299.

Jurors should never have been exposed to any of this evidence or the questions and answers pertaining to it. And, with a timely motion to dismiss under CrR 8.3(c), jurors would not have been. Instead, count 3 would have been dismissed prior to jury selection and jurors would never have heard about the charge or the Facebook post on which it was based, including references in the post to Nickerson's criminal past and the impact it had on Reed and her family. Moreover, as in Harris, the prejudice was compounded

by defense counsel's failure to request – following dismissal of count 3 – an instruction telling jurors they could not consider evidence related to the post in determining Nickerson's guilt on the two delivery charges. See Harris, 164 Wn. App. at 388 n.6.

In the absence of this improper evidence, convictions on counts 1 and 2 were far from assured. The searches of Reed prior to the buys were less thorough than they could have been (raising the prospect that Reed herself provided the methamphetamine given to detectives and may also have kept the buy money); on neither March 5 nor March 12 did detectives actually see or hear a transfer between Reed and Nickerson; and detectives made no efforts following each alleged buy to determine whether Nickerson possessed any of the buy money, which could easily have confirmed a buy. Instead, the State's ability to obtain convictions turned largely on the believability of Reed, who had a forgery conviction and strong personal incentives to convince law enforcement that Nickerson had sold her methamphetamine.

Counsel's failure to file a motion to dismiss under CrR 8.3(c) denied Nickerson effective representation and a fair trial. On this ground alone, a new trial is warranted.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO OTHER EVIDENCE OF NICKERSON'S PRIOR CRIMINAL HISTORY.

Although Judge Houser indicated he would be hard pressed to limit evidence of Facebook posts in light of the tampering charge in count 3, he granted the defense motions in limine, under ER 402, 403, and 404(b), to preclude the State's use of evidence concerning Nickerson's criminal history, including her convictions, arrests, or allegations of prior drug use. CP 18, 20 (motions 5 and 8); 3RP 25 (with a few noted exceptions, court grants defense motions). Yet, defense counsel did not object or otherwise act to keep this evidence from jurors during trial.

In addition to the evidence of Nickerson's criminal past contained in the Facebook post jurors should never have seen, Detective Whatley and Reed provided testimony revealing that Nickerson was well acquainted with the criminal justice system. Defense counsel's failure to object to this testimony or otherwise prevent jurors from hearing it also was ineffective.

Detective Whatley told jurors that confidential informants are told they can help remove drug dealers from the streets and "burn the bridges" with the people selling them "dope," strongly indicating that Nickerson was such a person. 4RP 68-69. Whatley then

testified that Reed told him she had previously purchased from Nickerson. 4RP 76. Immediately thereafter, Whatley explained that he was able to identify Nickerson through "I/LEADS, which is a computer based program that has pretty much every offender within Kitsap County in there." 4RP 76. Later, he also testified that he recognized Nickerson when he saw her on March 12 from her "booking photo," which again confirmed she had been arrested for criminal offenses in the past. 4RP 99. Moreover, Reed mentioned that she had met Nickerson in drug court and that she targeted Nickerson because she knew Nickerson was still using. 4RP 168, 175-176. And, during closing argument, the State argued Nickerson was familiar with methamphetamine given her experience in drug court. 5RP 315.

Defense counsel did not object to any of this evidence or argument. The most likely explanation (but not excuse) for counsel's failure to act is that – because there was no CrR 8.3(c) motion to dismiss the tampering charge in count 3 – jurors were going to hear *some* information about Nickerson's criminal past from the Facebook post that served as the basis for that count. But whether linked to counsel's failure to properly move for dismissal of count 3 or not, these failures constitute additional deficient performance.

Competent counsel would have objected to this irrelevant evidence, which also established criminal propensity under ER 401-403, and ER 404(b).

This evidence, in conjunction with that contained in the Facebook post, made it even more likely jurors would find Nickerson guilty of the charged deliveries despite the insufficient searches of Reed prior to the alleged buys, despite the failure of any detective to see or hear an actual exchange of money for drugs, despite the failure of detectives to determine whether Nickerson possessed any buy money, and despite Reed's strong self-interest in convincing detectives she had successfully arranged controlled buys.

Nickerson has shown both deficient performance and prejudice. This irrelevant and highly improperly prejudicial evidence of criminal propensity also requires a new trial.

3. THE TRIAL COURT COMMENTED ON THE EVIDENCE AND DENIED APPELLANT A FAIR TRIAL.

A key strategy in Nickerson's defense was to focus on the fact that, contrary to the express terms of the informant agreement, Reed had continued to use methamphetamine while working for Bremerton Police. See exhibit 15 ("I understand that this agreement also requires me to commit no further crimes and to ingest no illegal

drugs."); 4RP 123-124, 173-174 (counsel focuses on violation of this prerequisite to successful completion of agreement). Ultimately, defense counsel argued to jurors that Reed was not credible and should not be believed because she had lied when she signed the agreement, continuing to use methamphetamine thereafter. 5RP 303, 305-307.

Detective Whatley testified their department makes efforts to ensure informants are not still using drugs because any drug use negatively impacts that informant's credibility. 4RP 73-75, 124. He testified he did not have any reason to believe Reed was using while she worked as an informant, but had he discovered her drug use, she would likely have been "done." 4RP 144, 196-198. There was no urine testing, however, and – in fact – Reed admitted at trial that she had still been using ("dabbling") with methamphetamine while working as an informant for Whatley. 4RP 123-124, 173-174. She claimed, however, that she did not recall the prohibition on drug use in the agreement and that her use was insignificant in any event because it did not impact her undercover buys. 4RP 173.

Although defense counsel sought to use this evidence of drug use to help make the case to jurors that Reed was not trustworthy and had received a huge benefit from law enforcement without

complying with the terms of the informant agreement, Judge Houser accidently undermined this line of attack at the conclusion of Reed's testimony. After both counsel indicated Reed could be released from her subpoena, Judge Houser indicated in front of the jury, "You're excused. And you're free from this agreement you were under." 4RP 194 (emphasis added). Reed then thanked the judge. 4RP 194.

Judge Houser's proclamation that, in light of Reed's testimony at trial, she was now free from her confidential informant agreement, indicated to jurors that – in the court's mind – Reed had now done everything asked of her under the agreement. Hence, her release. This was an improper judicial opinion on the evidence, undermined a key defense argument, and denied Nickerson a fair trial.

Article 4, § 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this constitutional prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Moreover, this constitutional violation may be raised for the first time on appeal. The failure to object or move for mistrial at the trial level is not a prohibition to appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show that no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (subject of comment "never challenged in any way by defendant"; harmless).

Whether Reed had violated the informant agreement because she had used drugs (demonstrating she was not trustworthy or credible) or complied with the terms of the agreement (and was therefore worthy of jurors' trust) was an important and disputed issue at trial.

Indeed, during closing argument, the State used Reed's compliance with the agreement to bolster her credibility:

> She also fulfilled her agreement. You're going to get to take a look at the agreement that she signed with Officer Whatley when you go back to your jury room.
>
> You'll get to see on the last page, after these two transactions, she went on to do four more transactions with Officer Whatley. Would officer Whatley have kept working with her if he thought that she was not credible, not doing a good job?

5RP 296; see also 5RP 315 (counsel emphasizes in rebuttal closing that agreement fulfilled). Judge Houser's comment improperly bolstered these arguments.

In a case where Reed could have hidden the drugs on her body prior to the alleged buy, no one saw or heard an exchange with Nickerson, no buy money was ever recovered, and jurors' verdicts largely rested on the credibility of an informant with a forgery conviction and everything to gain by incriminating

Nickerson, the State cannot demonstrate the judicial comment was harmless.

4. CUMULATIVE TRIAL ERROR DENIED NICKERSON A FAIR TRIAL.

Cumulative trial error may deprive a defendant of her constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

Assuming this Court concludes that neither defense counsel's failure to timely and properly move to dismiss count 3 under CrR 8.3(c) (which unnecessarily exposed jurors to evidence that was irrelevant and highly prejudicial to Nickerson), nor defense counsel's failure to object to additional evidence of Nickerson's prior criminal history (which exacerbated the problem), nor the trial judge's comment on the evidence (which undermined a key defense argument), individually warrants a new trial, the combined effect of these errors certainly warrants that result. In combination, these errors eased the State's burden to convince jurors it had proved Nickerson's guilt while simultaneously impeding Nickerson's ability to establish reasonable doubt. They worked hand-in-hand to deny her a fair trial.

5. APPEAL COSTS SHOULD NOT BE IMPOSED

Nickerson was homeless and found to be indigent for purposes of trial and this appeal. 4RP 95; 6RP 18-19. Moreover, she is serving a 99-month sentence. CP 104. Her prospects for paying appellate costs are dismal. Therefore, if Nickerson does not prevail on appeal, she asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (instructing defendants on appeal to make this argument in their opening briefs), review denied, ___ P.3d ___ (June 29, 2016).

RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Nickerson's ability to pay must be determined before

discretionary costs are imposed.

The trial court made no finding of ability to pay. In fact, the trial court waived all discretionary LFOs, finding an absence of evidence Nickerson would have the ability to pay any discretionary costs in the foreseeable future. See CP 109; 6RP 18. Without a basis to determine that Nickerson has a present or future ability to pay anything, this Court should not assess appellate costs against her in the event she does not substantially prevail on appeal.

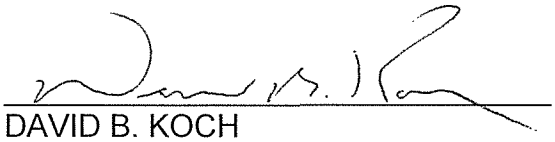
D. CONCLUSION

Ineffective assistance of counsel and trial court error denied Nickerson a fair trial. She respectfully asks this Court to reverse her convictions and remand for a new trial.

DATED this 27th day of July, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789

Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

July 27, 2016 - 2:26 PM

Transmittal Letter

Document Uploaded: 6-485273-Appellant's Brief.pdf

Case Name: Cheryl Nickerson
Court of Appeals Case Number: 48527-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

copy sent to : Cheryl Nickerson 772045 Washington Correctins Center For Women
9601 Bujacich Rd NW Gig Harbor, WA 98332

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

kcpa@co.kitsap.wa.us
rsutton@co.kitsap.wa.us
kochd@nwattorney.net